CF0000061730

(2)

IN THE HIGH COURT OF JUDICATURE, M.P. AT, JABALPUR:

CRIMINAL APPEAL NO. 1714 OF 1997:

Single Bench (Criminal)

APPELLANT * * * GOPAL DAS,
Son of Shri M.Das,
Aged about 41 years,
R/o Shanti Nagar, Bhilai-3,
District DURG (M.P.)

-VERSUS-

RESPONDENT * * * THE STATE OF MADHYA PRADESH.

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE

(14)

HIGH COURT OF CHHATTISGARH : BILASPUR

Criminal Appeal No. 1714 OF 1997

Gopal Das

Vs.

The State of Madhya Pradesh (now State of Chhattisgarh

J U D G M E N T

(15)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 1714 OF 1997

Gopal Das

Vs.

The State of Madhya Pradesh (now State of Chhattisgarh)

Appellant by Shri R.M. Pandey, Advocate.

State by Shri Satish Gupta, Dy. A.G.

J U D G M E N T

(Delivered on 25.10.2005)

The following oral judgment of the Court delivered by **Dilip Raosaheb Deshmukh, J**

Arguments heard.

2. This appeal is directed against the judgment dated 24th July 1997 delivered in sessions case No. 268/1994 by Shri V.K.Shrivastava, the then Sessions Judge, Durg whereby the appellant was convicted under Section 20 of the Narcotic Drugs and Psychotropic Substance Act (hereinafter referred to as 'the Act') and sentenced to imprisonment already undergone by the appellant during trial and fine of Rs.5,000/- and in default to undergo additional rigorous imprisonment for 10 months.

3. Brief facts are that on 16.07.1994 Sub-Inspector B.L.Tiwari P.W.2 upon receiving information that the accused appellant was in possession of *ganja* sought telephonic permission from C.S.P. R.S.Singh P.W.4 for making enquiry and proceeded to Shanti Nagar, Bhilai-3. He found that the appellant had in his possession one plastic bag in which Shri Tiwari had suspicion that the contraband article *ganja* was kept. After giving notice Ex.P.4 under Section 50 of the Act and after giving the accused-appellant an opportunity of searching him as well as witnesses, Shri B. L. Tiwari P.W.2 searched the bag in possession of the appellant at 3.40 P.M. and seized 6 kg and 600 grams of *ganja* vide Ex.P.3. A sample of about 200 grams *ganja* was separated and sealed and remaining *ganja* was also sealed. F.I.R. Ex.P.2 was lodged at

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Police Station Bhilai Nagar by Sub-Inspector B.L.Tiwari. The sample of contraband *ganja* was sent for chemical analysis to the Forensic Science Laboratory, Raipur which confirmed vide report Ex.P.6 that the sample contained *ganja*. Prosecution under Section 20 (b) (i) of the Act was launched against the accused appellant.

4. The accused-appellant abjured his guilt, pleaded innocence and false implication and examined one Narottamlal Soni D.W.1 in defense. The trial Judge relying upon the evidence of Sub-Inspector B.L.Tiwari P.W.2 and the report of the Forensic Science Laboratory, convicted the accused-appellant under Section 20 of the Act and imposed sentence as aforesaid.

5. Learned counsel for the appellant has argued that there is no legal and reliable evidence on record to prove the guilt of the appellant under Section 20 (b) (i) of the Act. He also contended that since in his evidence Sub-Inspector B.L.Tiwari had mentioned that he had seized *ganja* after searching the house of the appellant, there was complete non-compliance of the proviso to Section 42 (1) of the Act which mandatorily lays down that the information derived from any person leading to the belief that the accused had any Narcotic Drug in his possession should be reduced to writing. He further contended that there was no evidence to show that the appellant was in conscious possession of the *ganja* alleged to have been seized by Sub-Inspector B.L.Tiwari.

6. On the other hand, learned counsel for the State has argued in support of the impugned judgment.

7. I have heard rival contentions and have also perused the record. It is pertinent to note that the prosecution case is that B.L.Tiwari P.W.2 searched the plastic bag on the person of the appellant and not that the house of the appellant was searched. Independent witness Kailash Singh P.W.3 did not support the prosecution story. Another independent witness Satish Bansor was not examined by the prosecution. The testimony of Sub-Inspector B.L.Tiwari is rendered wholly unreliable due to the complete somersault taken by him in paragraph-17 of the cross-examination by stating that he had entered the house of the appellant and searched one of the rooms where the contraband

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ganja was kept in a plastic bag. This is a complete departure from the prosecution case. In cross-examination paragraph 13 B. L. Tiwari has stated that he entered the house of the appellant from the side of the courtyard and there was a room on the left side of the courtyard. It is not clear from his testimony if the room was locked or not and who lived in that room. He has also expressed ignorance about the other members of the family of the appellant living in the same house, which does not inspire confidence. It leads to an inference that the prosecution has failed to establish that the *ganja* was seized from the conscious possession of the appellant.

8. Even if implicit reliance was to be placed on the testimony of Sub-Inspector B.L.Tiwari in paragraph-13, there is a clear cut violation of Sub-Section (1) of Section 42 whereunder before entering in a building or place for affecting his search upon prior information of contraband *ganja* being kept therein the officer concerned has to record information so received in writing that contraband article was stored in the premises. Section 42 (2) of the Act lays down that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

9. In the case of *State of Punjab v. Balbir Singh* reported in **(1994) 3 SCC 299,** the Apex Court held that:

> "Under Section 42 (1), the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief."
>
> "Under Section 42 (2), such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42 (1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision, the same affects the prosecution case. To that extent it is mandatory."

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10. Reliance was placed in the case of *State of West Bengal v. Babu Chakraborty*, reported in **2004 Cri.L.J. 4858** which affirms the view taken in Balbir Singh (supra). In this case, Sub-Inspector B.L. Tiwari has clearly stated that upon receiving information he had proceeded to affect the search. Therefore, it was incumbent upon Shri B.L.Tiwari to record in writing the substance of such information given by any person. There is not even an iota of evidence to show that before affecting the search Sub-Inspector B.L.Tiwari had recorded the information received by him and had also informed the superior authority in writing under Section 42(2). The complete departure from the prosecution case regarding the place from which the *ganja* was seized renders the testimony of B.L.Tiwari wholly unreliable. As mentioned earlier it is doubtful that the *ganja* was seized from the conscious possession of the appellant. Conviction of the appellant under Section 20 (b) (i) of the Act can not therefore be sustained.

11. In the result, the appeal is allowed. Conviction of the appellant under Section 20 (b) (i) of the Act and sentence imposed thereunder are set aside. The appellant is acquitted of the charge under Section 20 (b) (i) of the Act. Fine paid, if any, shall be refunded to the appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Anjani